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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1747**

Craig Featherly,  
Relator,

vs.

Vitran Express, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed April 21, 2014  
Affirmed  
Connolly, Judge**

Department of Employment and Economic Development  
File No. 31202132-3

Craig W. Featherly, Blaine, Minnesota (pro se relator)

Vitran Express, Inc., c/o Thomas & Thorngren, Inc., Nashville, Tennessee (respondent)

Lee B. Nelson, Christine E. Hinrichs, Minnesota Department of Employment and  
Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Smith, Presiding Judge; Connolly, Judge; and Chutich,  
Judge.

## **UNPUBLISHED OPINION**

**CONNOLLY**, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that relator was discharged for misconduct, arguing that the alleged misconduct was an accident. Because the incident was a result of relator's negligence, it was misconduct within the meaning of Minn. Stat. § 268.095, subd. 6(a) (2012), and we affirm.

### **FACTS**

When relator Craig Featherly began work as a dock associate for respondent Vitran Express Inc. (Vitran) in mid-2012, he was trained on operating forklifts and on handling hazardous materials. He received "need for improvement" warnings in August and in October 2012.

In April 2013, a drum of isopropanol, a flammable, hazardous material, was punctured when relator failed to adjust properly the tines of his forklift and drove the forklift too fast. Relator was terminated for negligent operation of the forklift.

He applied for unemployment benefits. A representative of the Department of Employment and Economic Development (DEED) determined that relator was eligible for benefits because his unsatisfactory work performance was not intentional or caused by negligence or indifference and that he did not commit employment misconduct. Vitran appealed, stating that relator was discharged for a violation of company policy.

Following a telephone hearing, a ULJ determined that relator was discharged because of misconduct, was therefore ineligible for benefits, and had been overpaid \$1,134. Relator requested reconsideration and submitted a written statement from a

putative witness of the incident who had not testified at the hearing. The ULJ affirmed the prior decision, which relator now challenges.

## **D E C I S I O N**

Whether an employee committed employment misconduct is a mixed question of law and fact: whether the employee committed a particular act is a fact question, but whether that act amounts to employment misconduct is a question of law. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2011). Relator admits that he committed the particular act that resulted in his termination when he drove a forklift so that one tine punctured a drum of hazardous material. The issue, then, is whether this act was employment misconduct.

Employment misconduct is “any intentional, negligent, or indifferent conduct . . . that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.” Minn. Stat. § 268.095, subd. 6(a) (2012). Having trained relator on operating forklifts and on handling hazardous materials, Vitran had a right to expect that relator would drive at an appropriate speed and would adjust the forklift tines so that they would not puncture a drum of hazardous material.

At the hearing, Vitran’s service-center manager (SCM) was asked what relator’s supervisor said about the incident. According to the SCM, the supervisor reported that “[Relator] did not adjust the height of the fork tines to the proper height, then just drove right into the drum before he could stop, excessive speed.”

Relator repeatedly described the incident as “an accident,” but the SCM said, “I don’t really view this as being an accident. . . . I think it’s more negligent than an accident.” The ULJ determined that “[the SCM’s] testimony was more credible than [relator’s] testimony. He described a more plausible chain of events.” The ULJ’s decision reflected this credibility determination, and “[t]his court . . . gives deference to the credibility determinations made by the ULJ.” *McNeilly v. Dep’t of Emp’t & Econ. Dev.*, 778 N.W.2d 707, 710 (Minn. App. 2010).

When relator requested reconsideration, he submitted with his request a written statement from a putative witness who had not testified at the hearing. But, on a request for reconsideration, a ULJ may not consider any evidence not submitted at the hearing, except for purposes of determining whether to order an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c) (2012). In relevant part, the ULJ must order an additional hearing if the involved party shows that this evidence “would likely change the outcome of the decision and there was good cause for not having previously submitted the evidence.” *Id.* Relator argued that he “didn’t have [his] witness present [at the hearing] and [the ULJ] didn’t call [relator’s] witness who witnessed the accident.” But, at the beginning of the telephone hearing, the ULJ asked relator if he had any witnesses, and relator said he did not. The ULJ did not abuse his discretion by not holding another hearing to deal with new evidence submitted in support of relator’s request for reconsideration. “This court will not reverse a ULJ’s decision to deny an additional evidentiary hearing unless the decision constitutes an abuse of discretion.” *Kelly v. Ambassador Press, Inc.*, 792 N.W.2d 103, 104 (Minn. App. 2010).

Because relator does not dispute that he punctured a drum of hazardous material with a forklift and because this negligent conduct was a serious violation of the standard of behavior Vitran had the right to reasonably expect of relator, relator committed employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(a). We affirm the ULJ's decision that relator was ineligible for employment benefits.

**Affirmed.**